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No. 359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

SEATTLE GAS COMPANY, a corporation,
Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

A. C. VAN SOELEN,
Corporation Counsel,
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THE ARGUS PRESS - SEATTLE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

SEATTLE GAS COMPANY, a corporation, *Appellant*, vs. THE CITY OF SEATTLE, a municipal corporation, *Appellee.*	No. 359

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appeal in this case questions the correctness of a judgment of the Supreme Court of the State of Washington affirming a judgment and decree of dismissal by the trial court after sustaining a general demurrer to the appellant's amended complaint (R. 60, 33). Related cases are *Pacific Telephone & Telegraph Co. v. The City of Seatle, et al.*, and *Puget Sound Power & Light Co. v. The City of Seattle*, numbered, respectively, 364 and 344, October Term, 1933.

The instant case was disposed of by the Washington Court upon the opinions and decisions rendered in the related cases. Since the respective complaints in this and the *Power Company* cases are almost

identical, this cause will, in all likelihood, be controlled by the decision in the *Power Company* case. For this reason and for the reason that the appellant here reiterates and relies upon the arguments and authorities presented by the Power Company in its brief, we will not consume the time of this Court by repeating here all that appears in our brief already served and filed in the latter case. We content ourselves with a short resume' of the arguments and authorities there set forth, pointing out, however, any material differences.

Concisely, the case is made upon the following facts: The appellant is a domestic utility corporation, the appellee a municipal corporation of the State of Washington. They will, on occasion, be referred to herein as the Gas Company, or the Company, and the City, respectively.

In May, 1932, the City adopted its Ordinance No. 62662 (appearing in full in the Record at page 21) imposing a license or occupation tax upon persons, firms and corporations *and upon itself* for the privilege of engaging in the businesses affected. Among others, a tax was imposed upon those engaged in or carrying on the business of selling or furnishing gas and/or water for hire, measured by three per cent of the total gross income from such business in the City. The taxes commenced to accrue July 1, 1932, upon which date the appellant applied for the required license by the filing of a return of its gross income for the year 1931 and paid under protest (R. 17) the sum of $5,500.66 (R. 7), the first monthly installment of the tax. Thereafter it filed the com-

plaint herein (R. 1), seeking in its first cause of action the recovery of the amount so paid, and in its second cause of action an injunction against the collection of further monthly installments.

The City asserted claim to further monthly installments of the tax in like sums (R. 15).

In the exercise of authority first conferred upon it in 1890 (Rem. Rev. Stat., § 9488, *et seq.*), the City of Seattle on March 4, 1902, by popular vote, placed itself in the light and power business for the purpose of furnishing light and power to itself and its inhabitants (R. 4, 5). In launching upon this course, the City issued its general obligation bonds, of which the principal sum of $1,447,000 is still outstanding (R. 5). Since that time, the plant and system has been extended by the issuance and sale of utility revenue bonds, of which the principal sum approximating $32,852,000 is still outstanding. These bonds are obligations against only the gross revenues received from the sale of electric light and power, which revenues have been pledged to the payment of the bonds (R. 5, 6). Although the City possesses "full authority to regulate and control the use, distribution and price" of its electrical energy (Rem. Rev. Stat., § 9488), it does not appear whether the City realizes more from the sale of its product than sufficient to cover the said obligations and maintenance and operation.

The City utilizes electrical energy from its own plant and system for street lighting and other municipal and governmental purposes (R. 3) for which the City annually transfers from its tax supported

General Fund to its light utility revenue fund a sum determined upon to be the "true and full value" of the energy so used (Rem. Rev. Stat., § 9953). The amount so transferred in 1932 was $438,750.00 (R. 3).

In 1881, the City, by its Ordinance No. 234 (amending a prior ordinance, No. 39), granted to the appellant's predecessors the "Dexter Horton Franchise" authorizing the grantees therein named to erect and maintain gas works and to lay down pipes for the supply and distribution of illuminating gas in the City (R. 3). By a decision of the United States District Court in a cause entitled *"The Seattle Gas & Elec. Co. v. The City of Seattle, et al."*, rendered April 1, 1901, this franchise was declared perpetual. In 1901, the City granted a further franchise to the appellant's predecessors known as the "Malone Franchise", under Ordinance No. 6968, conferring upon the grantees the right, privilege and authority to erect and maintain gas works and to lay down, maintain and operate pipes in the streets, alleys, etc., of the City for the distribution and sale of gas (R. 4). Pursuant to these franchises, the appellant's predecessors and the appellant have continuously and without interruption sold gas to the inhabitants of the City and to others.

The City has no control over the rates charged for gas sold by the Company. These rates are fixed by the filing by the Company of its schedule of rates and charges with the Washington Department of Public Works (the State regulatory body), subject, however, to change by that body upon complaint and

after hearing (Rem. Rev. Stat., §§ 10363, 10364, 10365, 10390) (R. 2).

Insofar as gas and electrical energy may be used for the same or similar purposes, the City and the Gas Company are competitors in the same field within the City and solicit customers one from the other and from the open field (R. 2, 4). The record shows no coercion of customers by either. Because of this competition, the Company is required to sell more heat units at a given price than are supplied by the City by electrical energy for the same price (R. 3). The City has not increased its rates to enable it to pay into its General Fund the tax imposed upon its light utility (R. 10; Complaint XIX).

Before the tax in question became effective on July 1, 1932, the appellant filed with the Washington Department of Public Works a new schedule of rates for its gas which rates were increased by 3% for the purpose of shifting the tax to the consumer. Thereafter a hearing was had upon the new schedule, resulting in an (unreported) order by the Department, dated January 10, 1933, sustaining and confirming the same. A copy of said unreported order is printed as Appendix A to this brief.

SUMMARY OF ARGUMENT

First: **The Ordinance Applied to Appellant Does Not Transgress the Equal Protection Clause of the Fourteenth Amendment, Because—**

A. The Ordinance Taxes Both the Appellant and the City;

B. If the Tax Upon the City is Ineffective, it is

Due to Want of Power in that Respect. Such Want of Power Does Not Deprive the City of Authority to Tax the Appellant. If Paramount Law Operates in Favor of a Portion of a Class (In This Case the City), the Fourteenth Amendment Does not Afford the Remainder of that Class (In This Case the Gas Company) a Refuge Against the Exercise of the Power to Tax;

C. If the Tax Upon the City is Ineffective, the City's Situation and the Inherent Difference Between Appellant's and the City's Utility are Sufficient to Sustain a Tax Upon the One and Not the Other.

Second: **The Charge that the City, in Enforcing the Tax Against Appellant, Even Though the City Meets the Tax Upon Itself, Will Deny Appellant Equal Protection, Take Its Property Without Compensation, Deprive It of Its Property Without Due Process, Is Not Founded Upon Any Provision of the Ordinance or Any Fact or Circumstance in the Record or Elsewhere. This Charge Is Supported Only by the Appellant's Expression of Fear and Apprehension, Which Is of No Avail, for—**

A. Equity Does Not Allay Mere Fear and Apprehension;

B. Conjectural Future Abuse of the Power of Taxation Under the Provisions of the Ordinance is No Denial of the Existence of the Power Exerted.

Third: **The Requirement That Appellant Secure An Occupation License as a Condition to Its Continuance in the Gas Business in the City Does Not Impair Any Obligation of Its Franchise Contracts.**

A. Such Requirement Being Merely a Mode of Collection of the Tax Does not Unlawfully Interfere with the Contracts;

B. Appellant's Franchises are not Licenses to Pursue its Occupation in the City nor Exemptions from License or Occupation Taxation;

C. In any Event, the City Never Had, Nor has It, any Authority to Contract Away its Power of Taxation.

Fourth: **The Definition of "Gross Income" as Applied to Appellant Is Not Vague, Indefinite or Uncertain.**

ARGUMENT

First: **The Ordinance Applied to Appellant Does Not Transgress the Equal Protection Clause of the Fourteenth Amendment.**

A. The Ordinance Taxes Both the Appellant and the City.

The ordinance in Section 5, Subdivision (b), imposes an occupation tax upon every person engaged in or carrying on the business of selling or furnishing gas or water a tax equal to 3% of the gross income from such business in the City during his fiscal year next preceding the tax year, and in Subdivision (c)

upon every person engaged in or carrying on the business of selling or furnishing electric light and power a tax equal to 3% of the gross income from such business in the City during his fiscal year next preceding the tax year. By Section 6 the foregoing Subdivisions (b) and (c) are, so far as permitted by law, made applicable to the City of Seattle (R. 23, 24).

Notwithstanding the provisions of Section 6, the appellant alleges and maintains that the City is not obligated to pay the tax in respect to its light and power system, for the reason that the City, prior to the imposition of the tax and pursuant to state law, obligated its light utility revenues for the payment of the principal and interest of its utility revenue bonds. The Washington Supreme Court, as will appear from its opinion in the *Power Company* case appearing in the record at page 35, conceded the appellant's position in this respect solely for the purpose of argument. The decision is not determinative of the point made and, although the character of the lien of said utility revenue bonds has heretofore been in litigation, there has been no judicial determination of the precise status of the supposed lien. See *P. S. P. & L. Co. v. Seattle* (C. C. A.), 29 Fed. (2d) 254, 257; *City of Seattle v. P. S. P. & L. Co.* (C. C. A) 284 Fed. 659, 662 (Certiorari denied, *P. S. P. & L. Co. v. City of Seattle*, 262 U. S. 748, 67 L. ed. 1210). In the former case it was *expressly* held that the pledge of gross revenues to the payment of the bonds did not create a lien *in gross*.

The point attempted to be made that even if such

revenues could be subjected to the tax, no machinery is set up in the ordinance for that purpose is without foundation, since the City Charter (Art. IX, § 17) and the State budget law for cities (Rem. Rev. Stat., §§ 9000-13 to 9000-24, inc.) supply it. Under the terms of that law, the City Council is required annually, by ordinance, to set up a budget of its revenues and expenses for all departments, including utilities, for the ensuing year, and is required annually, by ordinance, after such budget is made up, to appropriate the items to the several departments which the administrative officers are authorized to expend in accordance therewith. All that remains to be done is the drawing and honoring of a warrant upon the utility fund in favor of the General Fund. The Court will presume that this administrative detail will be carried out.

Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176.

Any machinery set up in the ordinance would only be superfluous. A similar tax laid by the State upon the City would be paid in exactly the same way.

The tax imposed upon the City utilities, whether chargeable to capital or operation, may not be paid from the General Fund.

Asia v. Seattle, 119 Wash. 674, 206 Pac. 366;

Twichell v. Seattle, 106 Wash. 32, 179 Pac. 127.

In any event, such a transaction would be inane, meaningless, and a farce.

The tax upon the City utilities is as binding as

the tax upon the privately owned utilities, for when the City Council exercises its power to tax it acts governmentally as a representative of the sovereign. It has been so held in respect of the fixing of rates applicable to both private utilities and City-owned utilities under the police power.

City of Seymour v. Texas Electric Service Co. (C. C. A., Aug. 28, 1933) 68 Fed. (2d) 814, 817;

Inc. Town of Sibley v. Ocheyedan Elec. Co., 194 Iowa, 950, 187 N. W. 560;

Incorporated Town of Mapleton v. Iowa Pub. Serv. Co., 209 Iowa 400, 228 N. W. 476, 68 A. L. R. 993;

B. If the Tax Upon the City is Ineffective, it is Due to Want of Power in that Respect. Such Want of Power Does not Deprive the City of Authority to Tax the Appellant. If Paramount Law Operates in Favor of a Portion of a Class (In This Case the City) the Fourteenth Amendment Does Not Afford the Remainder of that Class (In This Case the Gas Company) a Refuge Against the Exercise of the Power to Tax.

If the provisions of the ordinance taxing the City utility are inoperative, it is because of constitutional inhibitions against impairment of the obligation of contracts with the bondholders; not because of failure to set forth the *modus operandi* in the ordinance. This being so, the tax fails because of the command of a paramount law. The City cannot be justly charged with discrimination against the appellant in

favor of its own enterprise. Deference of local authorities to paramount law with respect to part of a class, is held not to work a discrimination against the remainder of the class not harbored by such law.

Raley & Bros. v. Richardson, 264 U. S. 157, 68 L. ed. 615, 616;

Union Bank & Trust Co. v. Phelps, 288 U. S. 181, 187, 77 L. ed. 687, 690;

Packer Corp. v. Utah, 285 U. S. 105, 76 L. ed. 643.

C. If the Tax Upon the City is Ineffective, the City's Situation and the Inherent Differences Between Appellant's and the City's Utility are Sufficient to Sustain a Tax Upon the One and Not the Other.

If a classification results in the case at bar, placing the appellant in one class, subject to the tax, and the City in another class, free of the tax, that fact and other fundamental differences between the two afford a proper basis for the classification. That the differences between private electric utilities and private gas companies afford ample basis for difference in treatment in taxation consonant with the constitutional requirement of equal protection, was expressly held in *South Carolina Power Co. v. South Carolina Tax Commission*, 52 Fed. (2d) 515. There, a statutory three judge court sustained an act of the state of South Carolina imposing an excise tax upon the generation of electricity by hydroelectric and steam power, expressly exempting therefrom the generation of electricity by municipally owned plants, and exempting gas companies by failure of mention.

Judge Parker, writing the opinion for the court, said:

> "The act before us cannot be said to be palpably arbitrary in that it does not tax the generation of electricity by the use of combustion engines, nor because it does not tax persons furnishing gas to the public for light, heat and power. *The business of producing and selling gas is so fundamentally different from the generation of electric power, that to point out the differences which might furnish a basis for the taxation of one and not the other is clearly unnecessary.* * * *
>
> "So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. *Irvine v. Town of Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 368. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the Fourteenth Amendment. See *Village of Hardwick v. Wolcott*, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note."

Denial of an interlocutory injunction was affirmed upon appeal to this Court and reported in 286 U. S. 525, 76 L. ed. 1268. Upon appeal on the merits, this Court affirmed the trial court in a decision reported as *Broad River Power Co. v. Query*, 288 U. S. 178,

77 L. ed. 685. Apparently the appellants there were satisfied with the decision of the three judge court, for it does not appear that they urged the exemption either of municipal utilities or gas companies as an unlawful discrimination.

It was largely upon the authority of the aforementioned case that the Washington Supreme Court approved the instant tax upon the appellant Gas Company, assuming no similar tax upon the City electric plant. The decision of the Washington court also finds support in *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U. S. 66, 66 L. ed. 131; *Schoenfeld v. Seattle*, 265 Fed. 726; *State Bd. of Tax Comrs. v. Jackson*, 283 U. S. 527, 75 L. ed. 1248; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 67 L. ed. 237, and many other cases decided by this Court.

In opposition, the appellant relies upon the decision in *Lincoln Gas & Elec. Co. v. City of Lincoln* (1909) 182 Fed. 926, 929, and *City of Lincoln v. Lincoln Gas & Elec. Light Co.*, 100 Neb. 182, 158 N. W. 962.

In the case first cited, decided by the local Circuit (now District) Court, sitting in Nebraska, in a suit to restrain the enforcement of two ordinances, one fixing rates for gas, the other imposing an excise tax of two and one-half per cent upon the gross receipts of the company, *it was held that the tax was invalid as a violation of the constitution of the state of Nebraska, requiring occupation taxes to be equal and uniform* upon persons and property. The

Fourteenth Amendment of the Federal Constitution was not mentioned.

In the second case cited, decided by the Supreme Court of Nebraska in 1916, in an action by the City to collect the excise imposed by the ordinance theretofore considered by the local Federal Court, the Nebraska court held the ordinance void as a denial of the equal protection of the laws, following the decision of the Federal Court. The opinion is short and arguments supporting it unconvincing. The dissenting opinion filed by Justice Letton is, on the other hand, well reasoned and thoroughly convincing, and supports his position upon arguments and analogies closely similar to those in *Heisler v. Thomas Colliery Co.*, 274 Pa. 448, 118 A. 394, 24 A. L. R. 1215.

Conceding, for the sake of argument, that there is insufficient distinction between a private gas and a private electric company to sustain a tax upon the one and not the other, yet in the case at bar there are other and obviously greater distinctions between the municipal electric business and the private gas business.

Second: **The Charge That the City, in Enforcing the Tax Against Appellant, Even Though the City Meets the Tax Upon Itself, Will Deny Appellant Equal Protection, Take Its Property Without Compensation, Deprive It of Its Property Without Due Process, Is Not Founded Upon Any Provision of the Ordinance or Any Fact or Circumstance in the Record or Elsewhere. This Charge Is Supported Only by the Appellant's Expression of Fear and Apprehension, Which Is of No Avail.**

A. Equity Does Not Allay Mere Fear and Apprehension.

It is asserted in appellant's brief at page 19 that the City "is attempting, through the process of taxation, to destroy appellant's utility in order to foster its own. This, we submit, cannot be done." To this proposition it cites *Los Angeles Gas & Elec. Co. v. City of Los Angeles*, 241 Fed. 912, 918 (affirmed, 251 U. S. 32, 64 L. ed. 121). That case is, however, in no way apposite here. It clearly appears from the decisions that the ordinance there involved was a bold attempt by the city of Los Angeles, in the purported exercise of its police power, to cause the relocation in the streets of the facilities of a private electric company so that the facilities of the City's electric system might be installed. It was clearly pointed out by both Courts that if a real necessity existed, based upon preservation or protection of public peace, health or safety, the ordinance might have been sustainable, even though incidentally work-

ing to the advantage of the City's enterprise at the expense of the Company.

In the case at bar there is not the slightest suggestion upon the face of the ordinance or in any fact pleaded in the complaint from which this or any other Court could draw an inference of bad faith. To the contrary, the ordinance bespeaks the City's good faith, since it imposes a tax not only upon the City's light business, but also upon its water business as well as upon a number of private businesses.

The appellant's attempt to raise an inference or implication of bad faith springs only from its expressed fear and apprehension and from prophecy. It foretells that even though the City transfers utility revenues into the General Fund in payment of its utility tax, the City will nevertheless through exorbitant allowances for street and municipal lighting reimburse its utility fund out of its General Fund. Thus by circumlocution the utility fund will be relieved, while the collection of the tax from appellant will eventually wipe out its business. But neither accusations of bad faith nor fear of possible future events, without the allegation of a substantial supporting fact, will cause equity to act.

Lehmann v. State Board, 263 U. S. 394, 68 L. ed. 354;

Connecticut v. Massachusetts, 282 U. S. 660, 75 L. ed. 602;

New York v. Illinois, 274 U. S. 488, 71 L. ed. 1164;

Des Moines v. Des Moines Gas Co. (C. C. A.) 264 Fed. 506;

G. N. Ry. Co. v. Local Great Falls Lodge, etc., 283 Fed. 557;

P. S. P. & L. Co. v. City of Seattle (C. C. A.) 29 Fed. (2d) 254, 257;

City of Seattle v. P. S. P. & L. Co. (C. C. A.) 284 Fed. 659, 662, (Certiorari denied, 262 U. S. 743, 67 L. ed. 1210).

Should the City in future so rebate to its utility, at the same time insisting upon the tax from appellant, to its injury, the strong arm of Federal equity may be enlisted.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220;

Bradley v. City of Richmond, 227 U. S. 477, 483, 57 L. ed. 603, 606.

B. Conjectural Future Abuse of the Power of Taxation Under the Provisions of the Ordinance is No Denial of the Existence of the Power Exerted.

It is strongly urged by the appellant that under the circumstances presented by this record, the Court should invoke the Fourteenth Amendment to deny the City power to impose a privilege tax upon the appellant by this or any other ordinance so long as the City is a so-called competitor. The reason assigned is that the City *may abuse* the power. However, it is hardly necessary to cite authority to the proposition that the *possibility* of the abuse of a power is no denial of the existence thereof.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 376, 27 L. ed. 419, 424;

Alaska Fish Salt. & B.-P. Co. v. Smith, 255 U. S. 44, 48, 49, 65 L. ed. 489, 495.

Again, we should not lose sight of the fact that "The limitation contended for is upon a governmental agency, and the restraints upon that must not be readily implied." *City of Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 48 L. ed. 127.

Besides, the Court will presume that the City's public officers will act fairly and impartially. *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 279, 53 L. ed. 176, 185.

***Third:* The Requirement That Appellant Secure An Occupation License as a Condition to Its Continuance in the Gas Business in the City Does Not Impair Any Obligation of Its Franchise Contracts.**

A. Such Requirement Being Merely a Mode of Collection of the Tax Does Not Unlawfully Interfere with the Contracts.

The required license is merely a convenient mode of collecting the tax. It is in no sense exacted in the exercise of the police power. The license confers upon the holder no authority whatever except in respect of the taxing act. The penalty imposed is not for the failure to secure or have the license for its own sake or for the sake of any authority conferred, but for the purpose of facilitating collection. The license is a mere receipt.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497;

Home Ins. Co. v. Augusta, 93 U. S. 116, 23 L. ed. 825;

Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735;

Postal Tel.-Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871;

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 280.

The license requirement does not, therefore, deprive the appellant of any privilege it may have under its franchises.

B. Appellant's Franchises are not Licenses to Pursue its Occupation in the City Nor Exemptions from License or Occupation Taxation.

The appellant contends that the exaction of the license impairs or destroys its claimed licenses to pursue its business granted in its franchises.

In the first place, its franchises are not licenses in the sense contended for. Only the sovereign state may grant a franchise *to do*, the City only a secondary franchise for street occupancy. If appellant could conduct its business entirely upon private property, no franchise from the City would be necessary. Wireless communication companies are not, so far as we know, required to secure franchises from a city for the privilege of setting up and operating stations entirely upon private property. The franchises in question are what may be classed as secondary franchises granting privileges only in the streets, alleys and public places of the City. They are not to be confused with police licenses conferring privileges to pursue or carry on occupations or businesses, nor

with *nominal* licenses exacted in the collection of privilege taxes.

St. Louis v. W. U. Tel. & Tel. Co., 148 U. S. 92, 37 L. ed. 380;

Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

In *Memphis Gas Light Co. v. Taxing Dist. of Shelby County*, 109 U. S. 398, 27 L. ed. 976, the identical question here raised was decided in favor of the power to exact a license tax, notwithstanding the possession by the complainant of a so-called operating franchise.

See also *People ex rel. Metropolitan St. Ry. Co. v. State Bd.*, 199 U. S. 1, 50 L. ed. 65.

Moreover, the appellant's franchises will be examined in vain for any *express* provision exempting it from taxation of any kind. The appellant has failed to point out any such exemption. Any doubt regarding the existence of exemption from taxation is fatal to the claim therefor.

St. Louis v. United Rys. Co., 210 U. S. 266, 52 L. ed. 1054;

New Orleans C. & L. R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121;

People ex rel. Metropolitan St. Ry. Co. v. State Bd., 199 U. S. 1, 50 L. ed. 65;

Nebraska Telephone Co. v. City of Lincoln, 82 Neb. 59, 117 N. W. 284.

In *San Jose v. San Jose & S. C. R. Co.*, 53 Cal. 475, it was held that the imposition of a city license tax was not an interference with the franchise granted

by the sovereign State of California to construct and operate a railway.

C. In Any Event, the City Never Had, Nor Has It, Any Authority to Contract Away Its Power of Taxation.

The appellant makes no claim that the City ever had authority to contract away its power of taxation. Such a claim would be baseless. The Washington Court, in *Pacific Tel. & Tel. Co. v. Everett*, 97 Wash. 259, 269, stated that the City of Everett could not surrender its general taxing power in view of the State Constitution, Art. VII, § 4, providing:

> "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."

Fourth: **The Definition of "Gross Income" as Applied to Appellant Is Not Vague, Indefinite or Uncertain.**

The Washington Court, presumably deeming the definition sufficient, approved it without interpretation or construction. And so it comes here for construction, if that be found to be necessary. This Court will, if possible, so construe it as to render it constitutional.

> *Toombs v. Citizens Bank*, 281 U. S. 643, 647, 74 L. ed. 1088, 1090;
>
> *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 58 L. ed. 713, 720;
>
> *The Abby Dodge*, 223 U. S. 166, 175, 56 L. ed. 390, 393;

Fox v. Washington, 236 U. S. 273, 277, 59 L. ed. 573, 575.

A statute cannot be held void for uncertainty if any practical or sensible or reasonable construction can be given it.

State ex rel. Crow v. Westside St. Ry. Co., 146 Mo. 155, 47 S. W. 959;

Adams v. Green, 182 Ky. 504, 206 S. W. 759;

Pacific Coast Dairy v. Police Court of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217.

Courts may resolve to clearness a vague statute imposing a tax.

Southeastern Express Co. v. Miller, 264 U. S. 535, 539, 68 L. ed. 836, 839.

The appellant fails to point to any particular in which the definition, as applied to it, is vague, indefinite or uncertain. Vicarious criticism is made by reference to and adoption of the criticisms and arguments made by the Pacific Telephone and Telegraph Company, appellant in related case No. 364, and by a quotation from the dissenting opinion of Justice Steinert of the Washington Supreme Court (R. 42).

The Gas Company's situation is not different from the situation of either the Telephone or the Power Company. The following abridgment of the definition serves to cover them all:

> "The value proceeding or accruing from the sale of tangible property * * * without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, in-

terest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

The appellant sells property, gas. The value which accrues to it from the sale thereof is the price or compensation received from the consumer. Its price is fixed according to law under the same statutory provisions which control its present colleague, the Power Company (Rem. Rev. Stat., §§ 10363, 10365, 10443, 10444).

The value accruing to it cannot possibly be its net proceeds, particularly in view of the last portion of the definition expressly disallowing deductions for costs or expenses of any kind whatever. Since that portion of the definition omitted from the foregoing abridgment is of no concern to the appellant, it may not be heard to complain thereof.

U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508;

Utah P. & L. Co. v. Pfost, 286 U. S. 165, 186, 76 L. ed. 1038, 1049;

New York C. H. R. Co. v. U. S., 212 U. S. 481, 53 L. ed. 613;

Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868;

Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197.

That part of the definition reading as follows: "including rentals, royalties, fees or other emoluments, however designated," is also sufficiently adaptable to include the gross receipts from appellant's business.

Any claim that may be made that deduction of *receipts from the use of real property* from receipts for gas sold lacks foundation, since there is nothing in the record to show that receipts are acquired from that source. Receipts from gas sales are paid and received as receipts or proceeds from the sale *of personal property*. It does not appear from the complaint whether the appellant owns or leases the real property used in the conduct of its business. If it is lessee of such property, the rent paid therefor is chargeable to *operation* and as an operating cost is not deductible from receipts, as we have seen. If it owns the property, that fact does not transform the reasonable value of its use, which is the equivalent of rent, from an operating cost to a receipt from the use of realty.

The appellant alleges that in July, 1932, it filed its return showing its gross income for the year 1931 and paid the first monthly installment of its tax, computed on such income, in the sum of $5,500.66. There is no allegation that the City disputed the amount of income reported but, on the contrary, the City asserted claim to installments for subsequent months in like amount (R. 15).

That the appellant has had no difficulty in applying the definition in computing the amount of its tax is further evidenced by the fact that it applied for and was granted an increase in its rates for gas equal to 3% of the amount formerly charged. The order of the Washington Department of Public Works, together with the reasons therefor, appears as an appendix to this brief. It may be objected that in referring

to this order we are going outside the record in this case. We are satisfied, however, that upon the authority of the following cases the Washington Court would take judicial notice of formal orders of the State's utility regulatory body.

Whitney v. Spratt, 25 Wash. 62, 64 Pac. 919, in which judicial notice was taken of the rules and decisions of the United States Land Department;

Adams v. Canutt, 66 Wash. 422, 119 Pac. 865, in which judicial notice was taken of the rules and practice of the United States Interior Department;

Crouch v. Ross, 83 Wash. 73, 145 Pac. 87, in which judicial notice was taken of the practice of the State Commissioner of Public Lands to subpoena witnesses and administer oaths;

Clements v. Cook, 112 Wash. 217, 191 Pac. 874, in which judicial notice was taken of the prices fixed for timber by the United States War Industry Board during the time the Federal Government had control of the logging industry in the State;

North Pacific Coast Freight Bureau v. Dept. of Pub. Wks., 156 Wash. 137, 286 Pac. 86, in which, in reviewing an order of the Department of Public Works, judicial notice was taken of a rule of the department;

Jones' Commentaries on Evidence (2d ed.) Vol. 1, § 388, p. 677.

Furthermore, counsel for appellant and their colleagues, when these cases were before the Washington Supreme Court, invited that court to take judicial notice of the annual reports of the regulatory body without complaint or objection from the appellee.

This invitation was made upon authority of the following:

Chicago & N. W. Ry. Co. v. Railroad Com., 156 Wis. 47, 145 N. W. 216, 220;

State ex rel. University of Utah v. Candland, 36 Utah 406, 104 Pac. 285.

For the reasons advanced in this brief and in the briefs of appellee filed in the related cases before mentioned, the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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Counsel for Appellee.

515 County-City Building,
Seattle, Washington.
December, 1933.

APPENDIX A

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON

SEATTLE GAS COMPANY,	*Respondent.*	CAUSE No. 6545
VS.		
CITY OF SEATTLE,	*Petitioner,*	

FINDINGS OF FACT and ORDER

This matter came on regularly for hearing on the 15th day of August, 1932, pursuant to notice duly given before Fred K. Baker, Director, Frank Purse, Supervisor of Public Utilities, and B. R. Lewis, Supervisor of Transportation; the Department being represented by John C. Hurspool, Assistant Attorney General.

The parties were represented as follows:

City of Seattle

By J. Ambler Newton and Walter L. Baumgartner, assistant corporation counsel.

Seattle Gas Company

By C. K. Poe, attorney at law, Seattle, Washington.

Witnesses were sworn and examined, documentary evidence was introduced and the Department being fully advised in the premises makes and enters the following

FINDINGS OF FACT

The city of Seattle levied an excise tax, effective

~~and a return on the investment. Reduced to a com-~~

July 1, 1932, of three per cent of the gross operating revenues of certain public utilities, including the Seattle Gas Company, respondent herein. Respondent then filed its Schedule XI, effective six days before the effective date of the ordinance and increasing its gross billings three per cent. The complaint of the city raises the issue squarely—shall the company be permitted to increase its rates sufficiently to cover the tax or shall it be required to absorb the tax out of its earnings under the present rates.

The Department is of the opinion and finds that the rates named in Schedule XI are not unfair, unjust and more than sufficient. The record in this case consists in the main of the testimony and exhibits of Mr. Pollard, manager of respondent, Mr. Gray, special engineer for the Department, and Messrs. Carey and Harlan, engineers for the City. The records of former hearings were made a part of the record herein by stipulation for such uses as the parties might desire. Mr. Pollard's exhibit shows that the average value of the plant plus working capital on June 30, 1932, was $15,827,289 and that during the first six months of 1932 the earnings available for depreciation and a return on the investment were 5.13 per cent. Mr. Gray shows that the value on the same date was $11,761,820 and the return on the investment for the six month period, after charging off depreciation, was 5.73 per cent. Carey and Harlan show that the value on that date was $12,410,801 and that in the six month period the company earned 7.12 per cent for depreciation and a return on the investment. Reduced to a con-

parable form by deducting 2.18 per cent for an annual depreciation charge, the rates of return are:

Mr. Pollard ..... 2.95 per cent
Mr. Gray ..... 5.78 per cent
Carey and Harlan..... 4.94 per cent

When it is remembered that all of these men considered 2.18 per cent the minimum rate for depreciation, their testimony certainly cannot be used to support a finding that the company should pay the tax out of its present earnings.

The differences between Mr. Pollard on the one hand and Mr. Gray and Carey and Harlan on the other hand, are mainly the result of certain large deductions made by the latter. Each arrived at the present value by bringing down to date the value fixed in 1914 by adding the additions and betterments. All agree that the additions to June 30, 1932, amount to about $6,000,000. Mr. Pollard arrived at his present value by adding this $6,000,000 to the figure found by the Commission in its 1914 order. Messrs. Gray and Carey and Harlan insisted that the Commission erroneously included in its 1914 value the sum of $1,594,096 for development cost and a sum in excess of $900,000 for paving over mains. They also deducted about $250,000 for property no longer used in the public service. Carey and Harlan also excluded the entire management fee as a charge to operating expenses.

We are of the opinion that it is unnecessary for us to make the customary valuation findings. The record conclusively shows that after the excise tax is paid the return to the company on the lowest value

suggested will not be more than reasonable. This is a fortunate circumstance for the Department, for otherwise a new valuation study would have to be made. The three engineering studies submitted all begin with the 1914 valuation. We think that the testimony of Mr. Gray and Carey and Harlan throws serious doubt on the correctness of the order and makes it inadvisable to use that figure any longer. However, we do not believe that we have authority to review and correct that order. We agree with the City that rate making is a continuing function and that the errors in the 1914 order are not binding on us, but we do not agree that we can first impeach that order and then use it as a foundation on which to build present value. When it becomes necessary to fix a rate base for the company the proper and regular procedure is to make a new valuation, as was done in the recent case involving the Grays Harbor Railway & Light Company.

We cannot agree with the contention of the City that the 1914 order contains palpable errors within the meaning of *Pacific Power & Light Co. v. Department of Public Works*, 143 Wash. 67. The allowance for development cost is palpable, but is it erroneous? It is clear that the Commission made that allowance in lieu of an allowance for "going value". It was conceded by all the engineers and is established by many decisions of the United States Supreme Court that an allowance for going value must be made. The fact that the Commission computed it in the wrong manner and called it the wrong name does not seem to us to be a palpable error. Whether the allowance

is excessive for going value cannot be determined by reading the order, but necessitates reviewing the testimony. The palpability of the charge for paving over mains is more dubious still. The Commission did not say that it was making any such allowance. To prove that it did so, recourse must be had to the testimony and exhibits offered at the hearing. When it is remembered that this 1914 order has been before several subsequent Commissions and before the Superior Court of Thurston County and the State Supreme Court on two occasions, it is rather startling to suggest that it contains two palpable errors, aggregating more than two and a half million dollars.

Before concluding, we desire to advert to the management fee. Under the existing contract, the Seattle Gas Company pays about $7,000 a month to the holding company in Chicago. Although Mr. Pollard made a very able exposition of the value of the services to the local company, we find ourselves unable to believe that a charge of this size is necessary or legitimate. The company has a very able staff in Seattle that seems competent to handle any problem that may arise. We may note that its local staff handled the present proceedings, apparently without aid from Chicago. This management fee does not and will not affect the customers so long as the company is earning less than a reasonable return, after excluding the fee as a charge. It does, however, affect the financial stability of the company and the value of its securities. If this matter should come again before this Department, the charge will be disallowed unless the company proves in detail the amount and char-

acter of the services, the necessity of the services and the cost thereof to the holding company.

Figures have been suggested to us showing that the company, after charging all costs including the excise tax and depreciation, will under its present rates earn in 1932, 7.025 per cent on the depreciated value of its property and 5.953 per cent on the undepreciated value. Higher rates of return are shown for the prospective normal years after prosperity has returned. Figures based on a normal year (meaning a year like 1928 or 1929) are misleading. No one present at the hearing is qualified to say when such prosperity will return. Rates are made to fit existing conditions and not to fit conditions that may never come.

The computation of the return on the present depreciated value of the property is futile and will serve only to incite public animosity. Our Supreme Court has declared in several cases that the company is entitled to earn a reasonable return on the money prudently invested in the property. Moreover, the depreciated value suggested is not to be found in the testimony or exhibits in this case; it was computed from the records of earlier cases and the method used to determine the accrued depreciation has been condemned repeatedly by the courts. Furthermore, the depreciated value suggested contains no allowance for "going value." We understand that such an allowance must be made if the depreciated present value is used as the rate base.

The undepreciated value suggested is not far from the figure suggested by Carey and Harlan. The

figure used for working capital and supplies is the lowest figure shown in the record. The depreciation allowance is computed on the sinking fund basis, which results in a lower figure than the straight line method. Moreover, the figure used was regarded as too low by all of the engineers testifying in the case. Operating revenues were assumed to be almost as large for the last half of 1932 as for the first half, although the financial pages of the newspapers show that every utility is losing customers. A minimum allowance is made for operating expenses; the entire management fee is disallowed; the loss on merchandising and a large part of the new business expense is disallowed, although it clearly appears that these activities resulted in large increases in the sale of gas; all this in the face of the fact that the company can no longer sell its residuals, which formerly resulted in a large credit to operating expenses. The allowance for taxes, not including the excise tax, is less than the actual taxes paid last year, although a state levy on utility revenues will probably follow as an aftermath of the 40-mill law. Further, the newspapers inform us that the City of Seattle since the hearing has imposed a further tax or fee on the gas company, measured by the number of connections. The allowance for uncollectible revenues is fixed at $29,160, although the Manager of the company testified that the company had recently decided to set aside 2 per cent of the gross for that purpose. It is a matter of common knowledge that unemployment is increasing and that more and more people are exhausting their savings and their ability to pay.

There is no need to discuss the proposed findings further. After all deductions are made they show that the company at its present rates will earn in 1932 on the undepreciated value of the property, 5.95 per cent. We are not advised of any court decision holding that such a rate of return is reasonable and sufficient.

WHEREFORE IT IS ORDERED that the petition of the City of Seattle herein and these proceedings be dismissed.

IT IS FURTHER ORDERED that all money deposited and impounded in the Peoples Bank and Trust Company of Seattle in accordance with the order of this Department herein, dated June 23, 1932, be released and said bank is hereby authorized to pay over said money at the order of the Seattle Gas Company.

DATED at Olympia, Washington, January 10, 1933.

DEPARTMENT OF PUBLIC WORKS.
By FRED K. BAKER,
Director.
By B. R. LEWIS,
Supervisor of Transportation.